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No. 92-1053

In The

Supreme Court of the United States

October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

Intervenor-Petitioner,

vs.

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey Corporation t/a COUNTRY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

Plaintiffs-Respondents,

-and-

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LAMONACO; AND DOES 1-50,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

MOTION WITH BRIEF OF APPLICANTS NEW JERSEY ASSOCIATION OF REFORM RABBIS, RECONSTRUCTIONIST RABBINICAL ASSOCIATION, NEW JERSEY REGION OF THE RABBINICAL ASSEMBLY AND THE RABBINICAL COUNCIL OF NEW JERSEY AS *AMICUS CURIAE* TO FILE A BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BRUCE D. SHOULSON
Of Counsel

BRUCE D. SHOULSON
BRUCE S. ROSEN
On the Brief

BRUCE D. SHOULSON
Counsel of Record
LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN, P.C.
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700

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The New Jersey Association of Reform Rabbis, the Reconstructionist Rabbinical Association, the New Jersey Region of Rabbinical Assembly and the Rabbinical Council of New Jersey (hereinafter referred to as "Applicants") respectfully move this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari in this case. Consent of the attorneys for the intervenor-petitioner herein and defendants-respondents State of New Jersey, *et al.*, have been obtained, however, the newly-designated attorney for plaintiffs-respondents Ran-Dav's County Kosher, Inc., *et al.*, herein, Brian Koukoutchos, Esq., has refused to consent to the Applicants' filing of the accompanying brief as *amicus curiae.*

This case concerns a facial challenge to the validity of state regulations concerning the sale of foods which are kosher, that is, prepared in accordance with Jewish dietary laws. The requirement of eating only kosher foods is fundamental to the practice of Orthodox and Conservative Judaism; its ritualistic importance is also recognized by Reform and Reconstructionist Judaism. Because kosher food is so fundamental to the practice of Judaism, Jews have a particular interest in a state regulatory system aimed at protecting the rights of consumers of this type of food.

Applicants New Jersey Association of Reform Rabbis, Reconstructionist Rabbinical Association, New Jersey Region of the Rabbinical Assembly and the Rabbinical Council of New Jersey have an interest in this case in that their members serve congregations having as members more than 200,000 Jewish New Jersey residents covering the full spectrum of observance within Jewish life.

Although the Petition for Writ of Certiorari makes passing mention of the Applicants' role as *amicus curiae* before the New Jersey courts, Applicants believe that the discussion of this point is inadequate in that it does not fully explain the Applicants'

involvement in the proceedings below, nor does it discuss the vast numbers of Jewish congregants whose interests are represented by the rabbinic members of the Applicant Organizations. Unlike petitioner National Jewish Commission on Law and Public Affairs (COLPA), which is a national organization, the Applicants' New Jersey congregations are comprised of tens of thousands of consumers of kosher products in New Jersey, all affected adversely by the decision of the New Jersey Supreme Court below. Applicants' position is indicative, if not representative, of the interest of millions of consumers around the country who will be adversely affected should the decision below be allowed to stand.

Moreover, although the petitioner and the Applicants are in agreement on many points, the Applicants have no reason to believe that their argument will be adequately presented, expanded or made complete in this Court. If Applicants' argument is approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

BRUCE D. SHOULSON
Counsel of Record
LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN, P.C.
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700
Attorneys for Applicants New Jersey Association of Reform Rabbis, Reconstructionist Rabbinical Association, New Jersey Region of the Rabbinical Assembly and the Rabbinical Council of New Jersey

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STATEMENT OF INTEREST OF AMICUS CURIAE

Applicants represent the four major branches of Judaism in the State of New Jersey:

- The Rabbinical Council of New Jersey consists of 40 Orthodox Rabbis whose congregations have an aggregate membership of approximately 40,000 people. Orthodox Jewish tradition mandates the eating of only kosher food, *i.e.*, those foods permitted by the dietary laws of the Jewish religion.

- The New Jersey Region of the Rabbinical Assembly of America consists of 60 Conservative Rabbis whose congregational memberships number approximately 70,000 persons in Northern and Central New Jersey. Conservative doctrine accepts the requirement of adherence to the Jewish dietary laws and many Conservative Jews observe all of the kosher dietary requirements.

- The New Jersey Association of Reform Rabbis consists of 58 members whose congregations have some 80,000 members. While the majority of Reform Jews do not personally observe the kosher rules, they do recognize the ritual importance of kosher food to the other branches of Judaism. Many Reform synagogues permit only kosher catering on their premises.

- The Reconstructionist Rabbinical Association has approximately 12 members in New Jersey, whose total congregational memberships number about

> 10,000 persons; Reconstructionist doctrine calls for the observance of Jewish rituals based on their traditional and historical values. While adherence to dietary laws is not required, Reconstructionists believe that all Jewish institutions should be kosher and that the dietary laws are an important element of Jewish tradition.

Thus, consumption of genuine kosher food is fundamental to all four branches of Judaism. While the religious laws relating to kosher foods are rigorous and exacting, altogether prohibiting items such as pork, shellfish and certain animal parts, the physical appearance of most kosher foods is identical to their non-kosher counterparts. Moreover, strict observance of these religious laws adds significantly to the cost of these products. This cost differential provides ample opportunity for the dishonest vendor to charge a premium for non-kosher food represented to be kosher.

Consumers of kosher foods[1] must therefore rely on the state to protect consumers through adequate regulation of this industry. The Applicants in particular have a vital interest in seeking review of the New Jersey Supreme Court decision: if left undisturbed, the ruling of the court below would leave tens of thousands of consumers, including many of their congregants, largely unprotected from unscrupulous sellers who may falsely represent foods to be kosher.

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1. Not only Jews, but other individuals for religious or medical reasons need to be assured of the ingredients and preparation of foods certified to be kosher.

SUMMARY OF ARGUMENT

The majority opinion of the New Jersey Supreme Court rests upon several key factual errors, causing that court to determine that the State regulations at issue foster excessive entanglement in religious affairs, in violation of the "third prong" of the test enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In particular, the majority of the court below ruled there is no uniform standard among the four branches of Judaism for determining what is kosher and that disputes over that issue would inevitably arise requiring the state and/or the courts to interpret Jewish law. (Pet. App. A, at 20a). This is simply not the case.

The court below confused differences of opinion as to the *need to observe* kosher requirements with the requirements themselves. Supporting affidavits submitted by the Applicants as *amicus* below clearly state that the Orthodox standards for kosher food are universally recognized by all four branches of Judaism. In practice, the issues which arise involving kosher foods are not disputes over doctrine, but disagreements over facts.

STATEMENT OF THE CASE

Applicants adopt the Statements of the Case included in the Petition for Writ of Certiorari by the National Jewish Commission on Law and Public Affairs and the Brief on Behalf of Respondents, State of New Jersey, *et al.* in Support of the Petition for a Writ of Certiorari.

ARGUMENT

All four movements of the Jewish faith are united in their assertion that the term "kosher," without qualification, is understood to mean the historical Orthodox standard. The majority opinion in the court below not only grossly misinterprets that

standard, but manufactures out of whole cloth differences among the four movements as to what is considered kosher.

Under the state regulations at issue, "kosher" means a food product "prepared and maintained" in strict compliance with Orthodox Judaism's law and customs. Notwithstanding the contrary assertion of the court below, food preparation need not be supervised by a rabbi to be kosher; supervision does not change the status of food as kosher or non-kosher. The regulations are meant to protect against fraud and are based on objective and factual inquiries into the manner in which food described as kosher is produced and handled.

The majority below rests its conclusions on a series of erroneous factual assumptions designed to buttress its conclusion that the state kosher regulations are an impermissible entanglement of the state in religious affairs. Chief among these erroneous assumptions is the notion that "Without proper religious supervision, certain foods are simply non-kosher, even if they are constituted and prepared in identical fashion to kosher food." (Pet. App. A at 5a). This faulty premise is repeated at several other points in the decision. (Pet., App. A at 6a, 8a, 28a).[2]

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2. The majority also attempts to create a connection between the involvement of religious personnel in the supervisory process and the regulatory scheme itself. For example, the majority repeatedly infers that the regulatory scheme is tainted by the fact that the *present* Chief of the Bureau of Enforcement happens to be an Orthodox rabbi. While citing this coincidence no fewer than three times, the majority fails to point out that rabbinical ordination or even adherence to the Jewish religion is *not* a requirement for the job, and that its present holder is the first rabbi to occupy the post. (Pet. App. A, 17a, 18a, 25a).

The majority then cites the existence of the State Kosher Advisory Committee, a virtually defunct body created by an executive directive with no

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The purpose of religious supervision, to the extent a purveyor of kosher foods *voluntarily* elects to provide for supervision, is to offer the consumer some greater confidence in the reliability of the vendor and his products. Food is either kosher or not kosher, without regard to supervision.

More importantly, the majority fails to distinguish between (i) differences of belief as to the need to observe the kosher laws and, (ii) universal agreement as to a single standard of kosher. This failure, compounded by the court below's misreading of secondary sources, results in the erroneous and highly speculative conclusion that differences as to kosher standards would inevitably need to be interpreted by the state or the courts.

The majority's conclusions also fail to distinguish between the basic standards of the dietary laws, and more pietistic standards that individuals may apply to themselves. The existence of these "stricter" standards or "shades of observance" *id.*, in no way delegitimatizes the historical standards or reduces their universal acceptance. As the dissent below points out, "Concededly, some religious scholars may disagree over nuances of kosher-food preparation standards. However, these disagreements are not implicated by the objective regulations at issue here." (Pet. App. A at 48a).

The majority below engages in theoretical speculation when it predicts the possibility of the state becoming involved in deciding

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oversight function, as further evidence that "the regulations themselves have a principally religious meaning." (Pet. App. A at 18a). Neither a vendor nor the State Bureau of Enforcement is required to employ any particular religious personnel under the regulations. (Pet. App. A at 47a). Reliance on the involvement of specific religious personnel is improper in the context of a *facial* challenge to the regulations.

the correctness of a "variant" religious interpretation. As the facts of this case illustrate, the issues which arise in practice are not disputes over doctrine, but disagreement over facts. Was the product mislabeled? Did the product come from an acknowledged non-kosher source? Such speculation is inappropriate in the context of a *facial* challenge. As the dissent below notes, this Court has stated previously: "it has not been the Court's practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may (produce unconstitutional results)." *Roemer v. Board of Public Works*, 425 U.S. 736, 761 (1976), cited with approval in *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988). (Pet. App. A at 39a).

Applicants seek a review of the New Jersey Supreme Court's analysis, focusing on the real issues and concerns involved in the regulation of kosher food sales. The history of the enforcement process to date in New Jersey and many other states reveals numerous clear instances of consumer fraud knowingly perpetrated on the kosher food consuming public. No actual case involving claims of "variant" interpretations of the historical standard of kosher has been cited to the courts below. "The record is devoid of evidence to support the conclusion that by enforcing the regulations to identify fraudulent representation of kosher foods, the State necessarily interprets religious law or applies religious principles." (Pet. App. A at 54a).[3]

As the dissent below concluded on this point: "In assuming that all disputes would entail application of Jewish law . . . the majority remains preoccupied with those isolated, debatable aspects of kosher-food preparation that may be of theoretical interest to religious scholars, but have virtually nothing to do with this facial challenge." (Pet. App. A at 55a).

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3. There has been a similar absence of religious dispute during the 75 years of kosher foods enforcement in New York. (Pet. App. B at 85a).

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRUCE D. SHOULSON
Counsel of Record
LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN, P.C.
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700
Attorneys for Applicants New Jersey Association of Reform Rabbis, Reconstructionist Rabbinical Association, New Jersey Region of the Rabbinical Assembly and the Rabbinical Council of New Jersey